Petition

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81-966

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DONALD E. PERCY,
Petitioner,

v.

MILDRED DAUBERT and
ETHEL ROYSTER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

It is within the discretion of a federal district court judge to grant relief from a prior judgment under Fed. R. Civ. P. 60(b) based on a finding that continued enforcement of the judgment would work an injustice if the motion for relief from judgment was expressly premised on Rule 60(b) (5) and the court expressly declined to decide whether alleged changes in circumstances were sufficient to afford relief under that part of Rule 60(b) but did expressly decide that relief was warranted to avoid injustice?

PARTIES

The caption sets forth the named parties in the proceedings in the Court of Appeals.

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OPINIONS BELOW

The unpublished per curiam order of the United States Court of Appeals for the Seventh Circuit is attached hereto as Appendix A and the court's unpublished Order expressing its opinion is attached hereto as Appendix B.

The Decision and Order of the United States District Court for the Eastern District of Wisconsin is attached hereto as Appendix D.

The Judgment entered June 1, 1973, and from which relief is sought herein is attached hereto as Appendix E.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was dated and entered August 3, 1981. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 (1).

PERTINENT STATUTES AND RULES

Federal Rules of Civil Procedure 60(b) reads as follows:

> MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic),

misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Fed. R. Civ. P. 60(b).

45 C.F.R. § 206.10(a) (6) provides:

Assistance shall begin as specified in the State plan, which:

(i) For financial Assistance.

(A) Must be no later than:

(1) The date of authorization of payment, or

> (2) Thirty days in OAA, AFDC, AB, and AABD (as to the aged and blind), and 60 days in APTD and AABD (as to the disabled), from the date of receipt of a signed and completed application form, whichever is earlier: *Provided,* That the individuals then met all the eligibility conditions, and
>
> (B) For purposes of Federal financial participation, may be as early as the first of the month in which an application has been received and the individual meets all the eligibility conditions ....

45 C.F.R. § 206.10(a) (6).

Section 49.19(4) (b), of the Wisconsin Statutes (1979), reads as follows:

> The person applying for aid has allowed the county agent 15 to 30 days to process his application and, if not already a resident of the county, has notified the agency of his intent to establish residence in the county. Payments of aid to eligible individuals will not be retroactive beyond the first of the month in which eligibility is established.

Sec. 49.19(4) (b), Wis. Stats. (1979).

Section PW-PA 20.11(4) of the Wisconsin Administrative Code reads as follows:

> COVERAGE. Initial payment may include the needs to the first of the month in which aid is applied for and eligibility is shown to have existed as of the first of such month; provided, however, that this provision shall not preclude continuing payments when an eligible recipient moves from one county to another nor adjustments when grants of aid are reinstituted after suspension, nor ad-

> justments upon order of the state department of health and social services, division of family services, made in accordance with s. 49.50(8), Stats., nor in any case or similar cases in which a court decision changes the regulation upon which the case was denied, discontinued or the budget of the recipient was improperly computed, resulting in an improper reduction in the amount of aid.

Section PW-PA 20.11(4) Wis. Adm. Code.

STATEMENT OF THE CASE

During the Summer of 1980, State of Wisconsin officials determined that revenue collections were significantly less than anticipated. It appeared likely that there would not be enough revenue to cover appropriation levels previously established by the Legislature. In response to the projected revenue shortfall, the Secretary of the Department of Administration informed other state agencies that there would be a 4.4% across-the-board reduction in state expenditures (A-Ap. 133).

In response to the notice, the Department of Health and Social Services (H&SS) immediately undertook to determine how departmental expenditures could be reduced in response to the revenue shortfall, taking into account administrative, fiscal and legal considerations. With respect to the AFDC program,[1] it found little latitude for modification due to constraints imposed by federal regulations. Noncompliance with federal regulations subjects the Department to loss of federal participation in the AFDC program and other federal funds. The Secretary of H&SS determined that the only way to reduce expenditures adequately and

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1/ Aid to Families with Dependent Children. 42 U.S.C. § 601, *et seq.*; sec. 49.19, Wis. Stats. *et seq.*

fairly under the AFDC program, within the latitude allowed by federal law, was to change the policy on initial payments to AFDC recipients (A-Ap. 132).

When Secretary Percy announced the change in policy on August 13, 1980, he was told by welfare rights advocates that the change in policy was foreclosed by the terms of a consent judgment entered in *Daubert, et al. v. Schmidt, et al.*, Civil Action No. 73-C-11 (E.D. Wis. 1973).

A review of the *Daubert* judgment revealed that the first paragraph did ostensibly enjoin the change in policy. However, H&SS did not consider that part of the judgment to be binding because it was beyond the scope of the pleadings and it gratuitously removed the little discretionary authority the agency had with respect to AFDC policies.

On or about August 22, 1980, H&SS notified Judge Gordon of its intention to go forward with the change in policy. The Department also filed a Motion for Relief from Judgment.[2]

On August 29, 1980, plaintiffs in the *Daubert* action moved Judge Gordon to find the defendants in contempt.

Judge Gordon conducted a hearing on September 2, 1980. At the close of the hearing he ruled that

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[2]/ The original action involved challenges based on the United States Constitution, the Social Security Act and regulations adopted thereunder and jurisdiction was premised on 28 U.S.C. §§ 1331 and 1343 (A-Ap. Complaint, para. 2). The court had continuing jurisdiction over injunctions issued by it, and such jurisdiction is properly invoked upon a motion for relief from the judgment under Fed. R. Civ. P. 60(b). *System Federation No. 91, Ry. Emp. Dept. v. Wright*, 364 U.S. 642, 647 (1961); *Acheson v Albert*, 195 F.2d 573, 576 (D.C. Cir. 1952); *Lehman Co. v. Appleton Toy & Furniture Co.*, 148 F.2d 988, 989 (7th Cir. 1945).

paragraph 1 of the 1973 Judgment did by its terms foreclose the defendants from changing the initial payment policy for AFDC. He declined to find defendants in contempt since the defendants had refrained from actually implementing a change in policy and assured the court they would not do so if he found the change to be contrary to the terms of the 1973 Judgment.

Thereafter, the parties submitted additional written argument relating to the motion for relief from the judgment. By his Decision and Order dated October 21, 1980, Judge Gordon granted relief from the judgment.

In reliance thereon, defendants changed the initial payment policy for new AFDC recipients effective November 3, 1980.

An Amended Judgment reflecting the relief granted was entered in the *Daubert* case on November 5, 1980. The plaintiffs filed a Notice of Appeal in the United States Court of Appeals for the Seventh Circuit on November 12, 1980. On November 17, 1980, they filed a Motion of Stay Pending Appeal which was denied on December 15, 1980.

The parties submitted briefs on the merits and while they were waiting oral argument the Wisconsin Legislature enacted a bill which amended the state statutes to specify an initial payment policy for the AFDC program.[3] The legislative enactment took effect on April 1, 1981. SECTION 48(3), ch. 1, Laws of 1981.

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[3]/ The amendment appeared as follows in SECTION 21, ch. 1, Laws of 1981, with the stricken material being deleted and the underscored material being added:

49.19(4) (b) of the statutes is amended to read:

In its Order dated August 3, 1981, the Court of Appeals affirmed in part and reversed in part the district court's order granting relief from the 1973 Judgment. It affirmed the lower court's order to the extent it granted relief as of April 1, 1981, and thereafter. This holding was based on the change in underlying state law that took effect on April 1, 1981.

The Court of Appeals reversed the lower court to the extent it granted relief for a period of time prior to April 1, 1981. It held that Judge Gordon erred in granting relief based on a finding that continued enforcement of the judgment would work an injustice. It is this part of the Court of Appeals' order that petitioner asks this Court to review upon a writ of certiorari.

ARGUMENT

I. There Are Special And Important Reasons Why This Highest Court Should Exercise Its Discretion To Grant Review In This Case.

Before you, in effect, is one of the sovereign states seeking nothing more than fundamental fairness. It seeks to be relieved from part of a 1973 judgment

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49.19(4) (b) The person applying for aid has allowed the county agent 15 to 30 days to process his application and, if not already a resident of the county, has notified the agency of his intent to establish residence in the county. *Payments of aid to eligible individuals will not be retroactive beyond the first of the month in which eligibility is established. The effective date of eligibility for aid to eligible individuals is the date the applicant submits a signed and completed application to the county department of public welfare or social services, or the first date on which the applicant meets all of the eligibility criteria, whichever is later.*

which was entirely beyond the scope of the underlying pleadings and prayer for relief. The part of the judgment involved is entirely gratuitous and of no appreciable consequence in 1973 since it simply acknowledged a policy that was already in place and which was no doubt expected to remain in place given the existing and projected condition of the economy.

Although Judge Gordon signed the 1973 Judgment, when he was presented with the foregoing factors plus the fact that the proposed change in policy was clearly within the discretionary latitude which was otherwise conferred upon the state agency by state and federal law, he concluded:

> I am convinced that it would be an injustice to interpret the 1973 judgment in the manner the plaintiffs wish when the effect should be far greater than that necessary to achieve the relief originally sought. This is especially so when the desired interpretation completely removes all administrative discretion from the agency that has been properly given it in the statutory framework.
>
> ....
>
> The defendants have put forward the budgetary problems faced by DHSS and the state of Wisconsin as a changed circumstance sufficient to justify modification of the injunction. The plaintiffs in turn argue that these budgetary problems are not sufficient and cite considerable case law in support of that position. I am mindful of the problems outlined in Mr. Percy's affidavit, and I do not base this decision on them. I believe that it is the wiser use of the court's discretion to analyze this question solely in terms of the effect that the literal provisions of this

> injunction has on the proper discretion of DHSS. Therefore I do not reach the issue whether the budgetary problems outlined are a sufficient change in circumstances to justify modification of this injunction. I am persuaded that the operation of this injunction totally curtails the discretion of DHSS in this area and that this is an injustice that warrants relief from the 1973 judgment. Accordingly, the defendants' motion for relief will be granted and paragraph one of the 1973 judgment will be vacated.

(A-Ap. 124, 125).

To the extent the Court of Appeals has reversed this decision it has seriously interfered with the discretionary and primary authority of the federal district court to grant equitable relief from inequitable judgments. The decision of the Court of Appeals is based on an erroneously restrictive interpretation of Rule 60(b) which is inconsistent with prior decisions of this Court and other federal courts.

The Court of Appeals' decision not only deprives the State of Wisconsin of the equitable relief to which it is entitled, it also means that the state may have to pay an additional $1.5 million in AFDC benefits to new recipients who applied between November 3, 1980, and April 1, 1981. This is money the state had "saved" by changing the AFDC policy in reliance on Judge Gordon's order granting relief.

For these reasons and the more detailed reasons set forth below, the petitioner submits that this court should review the decision of the Court of Appeals.

II. Rule 60(b) Should Be Liberally Construed And Relief Granted Thereunder Rests Within The Sound Discretion Of The District Court And May Not Be Overturned On Appeal Except For Abuse Of Discretion.

It is well established that Rule 60(b) is equitable in nature and is to be liberally construed to the end that justice be done. *Klapprott v. United States*, 335 U.S. 601, 609, 615 (1949); *Erick Rios Bridoux v. Eastern Air Lines*, 214 F.2d 207, 210 (D.C. Cir. 1954); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245 (3rd Cir. 1951); 7 Moore's Federal Practice § 60.18[8], at 216.1 (2d ed. 1979).

It is also well established that an application for relief from a judgment "is addressed to the sound discretion of the trial court, the exercise of which will not be disturbed on appeal except for abuse." *Erick Rios Bridoux*, 214 F.2d at 210.

III. The District Court Exercised Its Discretion Properly In Granting Relief From The 1973 Judgment.

District Court Judge Myron Gordon granted the petitioner's motion for relief from the 1973 consent judgment he had signed in this case. He did so because he was convinced that continued enforcement would work a significant injustice (A-Ap. 122, 124, 125). In arriving at this conclusion, Judge Gordon considered the following factors and circumstances:

1. The policy regarding initial payments to AFDC recipients was not at issue in the underlying action, and to enjoin its change was beyond the scope of the pleadings and prayer for relief.

At the time the underlying lawsuit was commenced in January, 1973, the defendants were required by Wisconsin statutes to administer four categorical aid programs: Blind Aid, sec. 49.18, Wis. Stats. (1971); Aid to Families with Dependent Children (AFDC), sec. 49.19, Wis. Stats. (1971); Old Age Assistance, sec. 49.20, Wis. Stats. *et seq.* (1971); and Disabled Aid, sec. 49.61, Wis. Stats. (1971).[4/] Under the pertinent federal regulations and state law in effect at that time, the defendants had exercised their discretion and established a policy that initiation of payments under all four aid programs would commence as of the first of the month in which the application was made if eligibility was shown to exist as of that time. However, *under a separate policy,* payments would not be made for any period of time during which the applicant was receiving general relief from a county under sec. 49.01, Wis. Stats. *et seq.* (1971).

These policies applied equally to the four categorical aid programs. However, the practical effects were unequal. Compared with Old Age Assistance and AFDC recipients, persons seeking Blind Aid or Disabled Aid were generally disadvantaged because their applications took a much longer time to process and they were more likely to obtain general relief in the meantime, and persons receiving general relief remained liable therefore under sec. 49.08, Wis. Stats. (1971). The policies also resulted in disparate treatment of applicants receiving general relief when compared with applicants receiving income from other sources. Applicants receiving general relief were presumptively ineligible for aid for the period

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[4/] Effective January 1, 1974, the three state programs for old age assistance and aid to the blind and disabled were repealed in favor of federal administration of the Federal Supplemental Security Income (SSI) program under Title XVI of the Social Security Act. Ch. 147, Laws of 1973.

during which general relief was received. Applicants receiving income from other sources were considered eligible for aid, but the amount paid was reduced by the amount of the income from other sources.

The purpose of the *Daubert* lawsuit *(i.e.,* Par. 4, Prayer For Relief; A-Ap. 144) and the Consent Judgment was to eliminate the disparate impact on persons qualifying for Blind or Disabled Aid under the state administered programs and to treat persons receiving general relief the same as persons receiving income from other sources.

Nowhere does the complaint allege nor pray that the initial payment policy for AFDC recipients must be frozen. In fact, the allegations acknowledge that the initial payment policy was discretionary (Pars. 11, 13 and 14, Complaint; A-Ap. 138).

2. By its terms the injunction precludes government officials from exercising discretion that is otherwise clearly conferred upon them by state and federal law, and it is contrary to the public interest to foreclose the exercise of such discretion.

At the time of *Daubert,* the state agency had a certain amount of latitude in determining the point in time when initial aid payments would begin to accrue. The federal regulations provided that entitlement "must be no later than the date of authorization of payment" and that federal participation would be available for "as early as the first of the month on which an application has been received." 45 C.F.R. § 206.10(a) (6) (1971). The state statutes provided that payments could not be made retroactive "beyond the first of the month in which eligibility is established." Sec. 49.19(4) (b), Wis. Stats. (1971). The state administrative rules provided that the initial payment "*may* include the needs to the first of the month in which aid is applied for" (emphasis added). Section PW-PA 20.11(4) Wis. Adm. Code (1971).

Thus pursuant to federal and state law, the state agency was authorized but not required to make payments as of the first of the month in which an application was made. By federal law, the state had to commence entitlement no later than the date of authorization. Within the bounds of this discretion, Wisconsin adopted the most generous alternative in its state plan.

Substantially the same discretionary latitude is accorded to the state agency under current federal and state laws regarding administration of the AFDC program, although the federal regulation has been modified somewhat and state laws have been modified to reflect the fact that the state is no longer involved with Old Age Assistance or aid to the Blind or Disabled. 45 C.F.R. § 206.10(a) (6) as amended; sec. 49.19(4) (b), Wis. Stats.; section PW-PA 20.11(4) Wis. Adm. Code.

The *Daubert* Judgment was not aimed at changing the policy of initiating AFDC payments as of the first of the month. There was no legal basis for compelling such a change, and there was no legal basis for commanding that the practice remain the same. Then, as now, the state agency was empowered to make changes within the latitude prescribed.

By agreeing to cure certain inequities in the context of the *Daubert* case, the parties did not intend and did not have the authority to foreclose the state agency, forever and a day, from exercising its discretion within the limits prescribed by state and federal law. By voluntarily undertaking to remedy the disparate impact of uniform policies on persons seeking aid, the parties in *Daubert* did not intend that the State of Wisconsin would be forever bound to its 1973 policy regarding initial payments to AFDC applicants.

It is contrary to the public interest and good public policy for the state officials to be deprived of the latitude that is intended to be available to them under the law. A state's choice of an initial payment policy is a function of recipient needs and the state's generosity and ability to pay. In 1973, the State of Wisconsin was able to fund and was motivated to adopt the most generous policy. Now, the State of Wisconsin, along with units of government across the country, can no longer afford to be as generous as in the past. To deal with the sort of financial crises that confront them, government officials need to be able to cut back expenditures to the extent allowed by law. To deprive them of this, deprives the citizenry of good government by depriving them of good management.

Due to serious fiscal problems facing the State of Wisconsin, state officials decided that expenditures must be reduced, and Donald E. Percy, Secretary of the Department of Health and Social Services, concluded that the only clearly authorized way to accomplish reductions in the AFDC program is to change the initial payments policy within the limits prescribed by federal law. Affidavit of Donald E. Percy, dated September 15, 1980 (A-Ap. 131)[5]

It is against good public policy that he be deprived of options due to gratuitous and unappreciated concessions made on behalf of one of his predecessors in office at a time when the concession wrought no change and simply mirrored existing voluntary policy

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[5]/ It should be noted that Judge Gordon considered Wisconsin's financial problems but he said he would not base his decision on them. He said he would "not reach the issue whether the budgetary problems outlined are a sufficient change in circumstances to justify modification of (the) injunction" (A-Ap. 125). Thus, the Court of Appeals was wrong in stating that "the district court rejected an attempted showing by the defendants of changed circumstances due to the state's budgetary problems" (A-Ap. 112).

which would presumably continue because the ability to pay would also presumably continue.

IV. The Seventh Circuit's Interpretation And Application Of Rule 60(b) Is Contrary To The Interpretations Of This And Other Federal Courts And Is Contrary To Its Terms And Spirit And The Equitable Principles It Embodies.

According to this highest court Rule 60(b) is to be construed liberally and may be applied "to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott,* 335 U.S. at 615. The district court did this. The Court of Appeals did not.

The Court of Appeals applied the common law standard and interpretation that was in effect prior to the adoption of Rules 60(b) (5) and (6). The Court of Appeals expressly relied on *United States v. Swift & Co.,* 286 U.S. 106 (1932) (A-Ap. 113, 114) for the proposition that relief cannot be accorded unless there is a clear showing of grievous wrong evoked by new and unforeseen conditions. The *Swift* decision was issued in 1932. Rules 60(b) (5) and (6) were not created until 1946. 7 Moore's Federal Practice § 60.18[2], at 202 (2d ed. 1979). Therefore, the Court of Appeals was in reality relying on the more strict common law standard and not Rule 60(b) in its present form.

The Court of Appeals is subject to the same criticism made by Justices Black, Frankfurter and Douglas when they said of the majority in *Ackermann v. United States,* 340 U.S. 193, 205 (1950): "It does no good to have liberalizing rules like 60(b) if, after they are written, their arteries are hardened by this Court's resort to ancient commonlaw concepts."

It was error for the Court of Appeals to apply Rule 60(b) pursuant to the strict and obsolete standard expressed in *Swift*. Application of a liberal standard in accord with this court's application results in granting relief.

Although the district court declined to base its decision on a change in circumstances under Rule 60(b) (5), it found that relief was justified in order to avoid injustice. Although the court did not denominate it such, this finding amounts to a determination that relief is appropriate under Rule 60(b) (6) which authorizes relief for "any other reason justifying relief from operation of the judgment."

It is clear that the court may decline to accept the basis for relief relied upon by a party and on its own motion grant relief based on Rule 60(b) (6). This court did it in *Klapprott v. United States*, 335 U.S. 601, 614 (1949). The Court of Appeals for the District of Columbia did it in *Erick Rios Bridoux v. Eastern Air Lines, Inc.*, 214 F.2d 207, 209 (fn. 3) (D.C. Cir. 1954). Also other courts have done it. *Gray v. Estelle*, 574 F.2d 209 (5th Cir. 1978); *United States v. Backofen*, 176 F.2d 263 (3rd Cir. 1949); *Block v. Thousandfriend*, 170 F.2d 428 (2nd Cir. 1948). *See In Re Four Seasons Securities Laws Litigation*, 502 F.2d 834, 841 (10th Cir. 1974).

The petitioners did not originally move for relief based on Rule 60(b) (6) because they thought they had a good case under Rule 60(b) (5), and the Court of Appeals for the Seventh Circuit had stated quite clearly that relief could not be sought under Rule 60(b) (6) at the same time relief is sought under Rule 60(b) (5). *De Filippis v. United States*, 557 F.2d 341, 343 (7th Cir. 1977). This strict construction presents a shellgame to a party seeking relief. It is oblivious to the fact that Rule 60(b) was intended to do justice, not frustrate it.

Petitioner's submit that the proper standard on appellate review is the standard adopted *In Re Four Seasons Security Laws Litigation,* 502 F.2d at 841, *to wit:* "whether, under all of the circumstances, the relief granted was justified." The granting of relief by the district court meets this standard. The Court of Appeals wrongfully undoes the justice done. The Court of Appeals' decision depends on an interpretation and application of Rule 60(b), which are too restrictive and are in conflict with decisions of this highest court and other federal courts of appeals.

The petitioner respectfully submits that the court should exercise its superintending power and grant this petition for writ of certiorari.

Dated at Madison, Wisconsin, this 30th day of October, 1981.

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APPENDIX

APPENDIX A

Unpublished Per Curiam Order

JUDGMENT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 3, 1981

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

MILDRED DAUBERT and
ETHEL ROYSTER, Individually
and on behalf of all
other persons similarly
situated,
Plaintiffs-Appellants,

No. 80-2633 vs.

DONALD E. PERCY, etc.,
Defendant-Appellee.

Appeal from the
United States
District Court
for the Eastern
District of
Wisconsin

No. 73-C-11
MYRON L. GORDON,
Judge

*Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, sitting by designation.

This cause was heard on the record from the United States District Court for the *Eastern* District of *Wisconsin,* — Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED IN PART AND AFFIRMED IN PART, and the cause is REMANDED, with directions, with costs on appeal to be borne by the respective parties, in accordance with the order of this Court entered this date.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued: May 8, 1981

August 3, 1981

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

MILDRED DAUBERT and ETHEL ROYSTER, Individually and on behalf of all other persons similarly situated,
Plaintiffs-Appellants,

No. 80-2633 vs.

DONALD E. PERCY, etc.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 73-C-11
Myron L. Gordon, *Judge.*

Order

Plaintiffs-appellants, a class of Wisconsin welfare recipients, take this appeal from the Decision and Order of the United States District Court for the Eastern District of Wisconsin, dated October 21, 1980, granting the defendants' motion for relief from the judgment originally entered in this class action pursuant to a consent decree on June 1, 1973. The

*The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

defendants sought relief from the terms of the consent decree which, *inter alia*, enjoined the Secretary of the Department of Health and Social Services of Wisconsin (hereinafter "DHSS") from "failing to make grants of financial assistance (under the Aid to Families of Dependent Children (hereinafter "AFDC") and other welfare programs operated by the state), retroactive to the first of the month in which such financial assistance is applied for and eligibility is shown to have existed." Relief was sought by DHSS under Rule 60(b) (5) of the Federal Rules of Civil Procedure from the terms of the 1973 judgment that conflict with a DHSS proposal to change the date of the initial payment of benefits to AFDC recipients. Such relief was granted by the district court on the grounds that the decree effectively curtailed the discretion of DHSS over the timing of the commencement of the payment of benefits under the AFDC regulations and provided broader relief to the plaintiffs than was necessary to achieve the relief originally sought. The plaintiffs appeal from that decision and order.

Subsequent to the taking of this appeal, the Wisconsin legislature amended the state statute governing the effective date of eligibility for AFDC recipients. The amended statute provides that the effective date of eligibility for aid is the date the applicant submits a signed and completed application or the first date on which the applicant meets all of the eligibility criteria, whichever is later. Sec. 49.19(4) (b) Wis. Stats., effective April 1, 1981. DHSS is statutorily bound to comply with this legislative directive.

I.

The factual background of this case is as follows: The plaintiffs brought their original class action for declaratory and injunctive relief on behalf of all persons who were not awarded financial assistance

under the categorical assistance programs of the Social Security Act of 1935, 42 U.S.C. § 301 *et seq.*, retroactively to the first of the month in which they applied. The plaintiffs thereby challenged a DHSS policy of denying financial assistance to applicants for aid for any period in which the applicant had received General Relief under the Wisconsin Social Services Program, Sec. 49.01 *et seq.*, Wis. Stats. (1969) during the pendency of their applications. The challenged DHSS policy was based upon an assumption that General Relief adequately provided for an individual's needs and thus obviated the need for additional welfare benefits. The plaintiffs charged that this policy violated rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, the Social Security Act and Regulations of the Department of Health, Education and Welfare issued thereunder.

The parties subsequently entered into a consent decree on June 1, 1973, which provided in relevant part as follows:

> [Defendants] are hereby permanently enjoined from failing to make grants of financial assistance under the categorical assistance programs known as Blind Aid, Sec. 49.18, WIS. STATS. (1971), Aid to Families with Dependent Children, Sec. 49.19, WIS. STATS. (1971), Old Age Assistance, Secs. 42.22 *et seq.*, WIS. STATS. (1971), and Disabled Aid, Sec. 49.61, WIS. STATS. (1971), retroactive to the first of the month in which such financial assistance is applied for and eligibility is shown to have existed.

On August 22, 1980, defendants filed in the district court a "Notice of Intention To Act Consistent With 45 C.F.R. 206.10(a) (6) and Sec. 49.19, Wis. Stats., an

Rules Adopted Thereunder." The notice advised the court that the Secretary of DHSS intended to act pursuant to the authority vested in him under the aforementioned statutes to alter the effective date of eligibility for applicants of AFDC. Under the proposed policy, new AFDC applicants would receive benefits beginning as of the time a completed application is entered into the state's computerized system, or twenty-nine days after the date of application, whichever came first. The proposed policy change would thus depart from the prior DHSS policy of paying benefits retroactive to the first of the month of application or as soon thereafter as eligibility was shown to exist. It would also contravene the literal terms of the 1973 consent decree. The defendants concurrently filed a motion for relief from the terms of the 1973 judgment under Rule 60(b) (5) of the Federal Rules of Civil Procedure.

The Secretary of the Wisconsin Department of Health and Social Services, Donald E. Percy, explained in an affidavit filed in support of the motion for relief that the proposed policy change was the agency's way of coping with state fiscal deficits by reducing the expenditures for the AFDC program through measures which were within the area of administrative discretion allowed under federal welfare regulations: the governing federal statute, 45 C.F.R. 206.10(a) (6), provides that, for the purposes of federal financial participation, entitlement will begin as specified in the state plan and may be as early as the first of the month in which an application has been received and the individual meets all of the eligibility conditions. Former Section 49.19 Wis. Stat. stated only that payments of aid to eligible individuals will not be retroactive beyond the first of the month in which eligibility is established. State Administrative Code § PW-PA20.11(4), provides that the initial payment of categorical assistance may include the needs to the

first of the month in which application for such assistance is made and eligibility is shown to have existed. As can be seen from the foregoing review, none of the pertinent state and federal provisions specifically provided that payment be made in the manner directed by the consent decree. Rather, the decree embodied the policy established by DHSS within its discretion under the relevant state and federal regulations noted above.

Defendants brought their motion for relief from judgment under Rules 60(b) (5) of the Federal Rules of Civil Procedure based on the following grounds: first, that the equitable basis for granting the injunction no longer existed, and second, that it would be inequitable to foreclose the exercise of administrative discretion that is clearly conferred by state and federal laws.[1] The district court agreed with the second ground for relief advanced by the defendants, that the operation of the injunction totally curtailed the discretion of DHSS to determine the effective date of eligibility for welfare benefits. This alone, in the court's view, constituted an injustice warranting relief from the 1973 judgment. Furthermore, the court reasoned that it would be inequitable to bind the defendants to the 1973 decree inasmuch as it provided broader relief than was necessary to remedy the discriminatory treatment of General Relief recipients under the former payment

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[1]/ The district court, in its Decision and Order dated October 21, 1980, disposed of the first ground by noting that although, as the defendants claimed, three of the four assistance programs were no longer administered by the state, those programs — Old Age Assistance, Blind Aid, and Disability Assistance Aid — were repealed in favor of federal administration on January 1, 1974, well over five years ago. Thus that change could not be regarded as a change in circumstance sufficient to justify modification of the injunction. Moreover, the court noted that the AFDC program, which is the subject of the controversy at bar, is still administered by the state.

policy of DHSS.[2] The court specifically declined to base its decision on the alleged state budgetary problems averted to by the defendants in order to demonstrate a change in circumstance sufficient to justify a modification of the injunction.

The district court granted the defendant's motion for relief from judgment and entered an amended judgment on November 5, 1980, that did not include a provision designating the commencement date for the payment of welfare benefits. The plaintiffs thereupon took this appeal from the amended judgment and order of the district court. The plaintiffs also filed motions for a restraining order and for a stay pending appeal, which motions were denied.

Pursuant to Circuit Rule 11, the defendants filed in this Court copies of State of Wisconsin Laws of 1981, chapter 1, containing the amended Sec. 49.19(4) (b), Wis. Stats., which provides:

> The effective date of eligibility for aid to eligible individuals is the date the applicant submits a signed and completed application to the county department of public welfare or social services, or the first date on which the applicant meets all of the eligibility criteria, whichever is later.

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[2]/ The court's conclusion that the decree granted overbroad relief was in view of the fact that the underlying lawsuit was not brought to require DHSS to pay benefits retroactive to the first day of the month when the application was filed. That policy was in effect prior to the filing of a lawsuit and was not directly affected by it. Rather, the relief sought by the plaintiffs in the original class action was a requirement that DHSS apply this policy uniformly to all applicants for aid under the four categorical aid programs then administered by the state, irrespective of whether an applicant had received General Relief or not.

II.

The issue originally presented on appeal was whether the district court properly exercised its discretion in granting the defendant's motion for relief from judgment under Rule 60(b) (5) of the Federal Rules of Civil Procedure.[3] However, the defendants-appellees have brought to this Court's attention the recent amendment of Sec. 49.19(4) (b), Wis. Stats. that has the effect of changing the entire posture of this case, at least with respect to the appellants' claim subsequent to April 1, 1981, the effective date of the legislation in question. At the outset we note that it was within the authority of the Wisconsin legislature under the Federal Welfare Regulations to enact the amendment of Section 49.19(4) (b), Wis. Stats. 45 C.F.R. 206.10(a) (6) and that DHSS is bound by state law to administer public assistance in accordance with such duly enacted statutory provisions. Section 46.03 (8) Wis. Stat.

Where, as here, the terms of an injunction are brought into conflict with statutory objectives by a subsequent change in law, it has long been settled that judicial deference to the legislative revision of a judicial decree is mandated. *System Federation v. Wright,* 364 U.S. 642, 81 S.Ct. 368 (1961); *Hodges v. Snyder,* 261 U.S. 600, 43 S.Ct. 435 (1923); *State of Pennsylvania v. Wheeling and Belmont Ridge Company,* 59 U.S. (18 How.) 421, 15 Lawyers Edition 435 (1855); *Class v. Norton,* 507 F.2d 1058 (2d Cir. 1974); *McGrath v. Potash,* 199 F.2d 166 (D.C. App.

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[3]/ Rule 60(b) (5) provides the following grounds for relief from judgment:

> The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

1952); *See: Commissioners of Highways of Towns of Annawan v. United States,* 466 F. Supp. 745 (N.D. Ill. 1979); 7 Moore's *Federal Practice,* Para. 60.24[4] (1979).[4] The consent decree in this case stands in much the same posture as did the injunction at issue in *Class v. Norton,* (supra). In that case the Connecticut Commissioner of Welfare appealed a denial of the state's motion for relief under Rule 60(b) (5) from an order of the district court which, among other things, enjoined the Commissioner to process applications for AFDC within thirty days of an individual's filing of an application. The order at issue in that case was based on an HEW regulation that had established a thirty-day ceiling for processing welfare applications, but which was subsequently amended to extend the period to forty-five days. The Second Circuit det-

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[4]/ The policy of judicial deference to legislative revision of statutes upon which a prospective court order is based was first enunciated in *Pennsylvania v. Wheeling and Belmont Bridge Company, (supra).* There the Supreme Court vacated an earlier decree directing the removal of a bridge as an obstruction to navigation under federal law in view of legislation subsequently enacted by Congress declaring the bridge to be a lawful structure. In so doing, the Supreme Court recognized an exception to the general proposition that an act of Congress cannot abridge the rights of parties established by a court judgment. This exception to the inviolability of court judgments arises where suit is brought to enforce a public right. *(Id.* at 431.) Public rights are involved when a judicial decree calls for actions which would directly effect the rights of many people not privy to the judgment. *Daylo v. Administrator of Veteran's Affairs,* 501 F.2d 811, 816 (D.C. Cir. 1974). The Supreme Court in *Wheeling and Belmont Bridge* also distinguished an action for damages, which is based on a private right, from one for injunctive relief, noting that only the latter is subject to legislative change. *(Id.)* The principle of judicial deference enunciated in *Wheeling Bridge* applies equally to injunctions contained in consent decrees. *System Federation v. Wright,* 364 U.S. at 650, 651. The Supreme Court in the latter case followed *Wheeling Bridge* to hold that the district court erred in refusing to modify a consent decree barring a union shop in light of a subsequent act of Congress making a union shop permissible.

ermined that the principle of deference enunciated in *Wheeling* and *System Federation* was decisive of that case, reasoning as follows:

> The principle's application to the instant case is plain. The district court required that the appellant process AFDC applications within 30 days of filing because the HEW regulations so required. Unlike that part of the court's order relating to retroactive payments, *see* II, *infra*, this 30-day ceiling relied for its force upon a regulation which has since been amended. In this instance, therefore, the amendment to the regulation directly undercuts the authority for the 1972 order.

At page 1062.

In the instant case, the district court's decree was patterned after a DHSS policy that was authorized by a state statute that was subsequently amended. Consequently, the amended statute effectively undercuts the authority of the 1973 decree to direct the manner of payment of welfare benefits by the defendants. Where there has been a change of law upon which a prior judgment is based, albeit indirectly in the instant case, a ground for relief is established under Fed. R. Civ. P. 60(b) (5), since the statutory basis for the injunction has been removed. *Cf.*: *McGrath v. Potash*, 199 F.2d at 167 (applying Fed. R. Civ. P. 60(b) (6); *See*, 7 Moore's *Federal Practice*, Para. 60.24[4] at 335. Were the district court to find otherwise would be an abuse of discretion. *See, e.g., Class v. Norton*, (supra); *System Federation v. Wright*, 364 U.S. at 373.

Accordingly, the order of the district court granting relief from judgment is affirmed on the basis of the legislative revision of the 1973 consent decree that took effect April 1, 1981. However, as more particularly set forth below, we find that the district court erred in

initially granting relief from judgment on the grounds asserted in its opinion. Consequently, our affirmance is partial, extending from the April 1, 1981, effective date of the amended legislation; we reverse the district court's order for the period intervening between the entry of the amended judgment on November 6, 1980, and the April 1, 1981, effective date of the amended legislation.

III.

The district court held that further enforcement of the 1973 judgment worked an injustice warranting relief under Federal Rule of Civil Procedure 60(b) (5) because the terms of the decree curtailed DHSS discretion and granted overbroad relief to the plaintiffs. At the same time the district court rejected an attempted showing by the defendants of changed circumstances due to the state's budgetary problems arising after the 1973 decree, based upon its interpretation of our opinion in *DeFilippis v. United States*, 567 F.2d 341 (7th Cir. 1977) as not requiring a showing of changed circumstances under Rule 60(b) (5). In this connection the court opined:

> In addition to the "change in circumstances" test in *DeFilippis*, I believe that such case permits a broader consideration in resolving the issue of amending the judgment. The party desiring modification may also show that continued enforcement of the injunction 'works an injustice. *DeFilippis*, p. 344. I am convinced that further enforcement of paragraph 1 of the 1973 judgment will indeed work a significant injustice sufficient to warrant modification of the injunction.'

Our interpretation of *DeFilippis* does not support the district court's conclusion that a party desiring

modification may also show, in addition to the change in circumstances, that continued enforcement of an injunction works an injustice. *DeFilippis* involved an appeal by the Marine Corps from a denial of a motion to vacate an earlier permanent injunction prohibiting the Marine Corps from enforcing its "no wig" regulation against members of the Marine Air Reserves. The government sought relief from the prior injunction after the Supreme Court in *Kelley v. Johnson,* 425 U.S. 238, 96 S.Ct. 1440 (1976) upheld the validity of police department hair grooming standards similar to those of the Marine Corps. We held against the government in *DeFilippis* for the express reason that, "(the government) had made no showing of how continued enforcement of the injunction works an injustice or constitutes a 'grievous wrong' .... it only cited *Kelley v. Johnson,* (425 U.S. 238, 96 S.Ct. 1440 (1976)). The *Kelley* decision, even if applicable, was not itself such a subsequent event as to render inequitable continued application of the injunction." (at 344).

The district court apparently concluded from this quoted language that "The party desiring modification may *also* show that continued enforcement of the injunction 'works an injustice.' *DeFilippis* p. 344." Nowhere is there language in that opinion which clearly allows such an alternative showing under the rule. The district court read the "works an injustice" language in the opinion out of context. When read as a whole, it is clear that our opinion in *DeFilippis* applies the well settled principle of *United States v. Swift,* 286 U.S. 106, 52 S.Ct. 460 (1922). That treatise adopts the *Swift* standard and is expressly relied upon and summarized in *DeFilippis* in pertient part as follows: "This provision Rule (60(b) (5)) does not allow relitigation of issues that have been resolved by judgment. Rather, it requires a change in the conditions that make continued enforcement inequitable." (*DeFilippis* 343-44 and 11 Wright & Miller,

Federal Practice, § 2863 (1973), that relief from a consent decree may be accorded only when it would be inequitable to enforce the decree due to a change in conditions.)[5] The alternative showing suggested by the district court would be a major departure from the rule of decision established by *Swift* and consistently followed by this and other courts in interpreting the "no longer equitable" phrase contained in Rule 60(b)(5) as referring to a change in conditions. *See generally*, 7 Moore's *Federal Practice (supra)* at 333, 334. If the suggested alternative "works an injustice" standard were intended by this Court, a more explicit indication and explication of our departure from prior holdings would have been forthcoming.

It is significant that the two reported cases which cite *DeFilippis*, *Baird v. Lynch*, 82 F.R.D. 16, 18 (E.D. Wis. 1979) and *Schmidt v. Shubert*, 79 F.R.D. 128, 129 (E.D. Wis. 1978), both quote from that opinion the following: "Rule 60(b) provides for extraordinary relief. Because of the interest in finality of judgments, Rule 60(b) requires a showing of exceptional circumstances or a grievous wrong evoked by new and unforeseen

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[5]/ In addition to this Court's express reliance in *DeFilippis* on the *Swift* standard noted above, there are other indications on page 344 of that opinion of our adherence to the "changed circumstances" requirement. For example, the phrase "grievous wrong," as internally quoted in the sentence quoted above from our holding in *DeFilippis*, appears in a line from *Swift* that we quoted and underscored in *DeFilippis* as follows: *"Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions* should lead us to change what was decreed after years of litigation." *(Id.)* Thus as the phrase "grievous wrong" is used in this Court's opinion in *DeFilippis*, it is obviously used in reference to the *Swift* quotation immediately preceeding, wherein grievous wrong is of the sort evoked by new and unforeseen conditions. Moreover, this Court continued its discussion by noting that the *Kelley* decision, relied upon by the government in that case, "was not by itself such a *subsequent event* as to render inequitable continued application of the injunction." *(Id.)* (emphasis added).

conditions." (quoting from *DeFilippis*, p. 342). Implicit in the reliance of the Wisconsin District Courts in *Baird* and *Schmidt (supra)* upon the foregoing proposition from *DeFilippis*, is that the lower courts have not heretofore interpreted the *DeFilippis* opinion as allowing the alternative showing suggested by the district court. In conclusion, we hold that the district court erred in thus interpreting *DeFilippis* and that it was an abuse of discretion to grant the defendants' motion to vacate in the absence of a finding of changed circumstances.

The October 21, 1980, order of the district court granting the defendants' motion to vacate paragraph one of the 1973 judgment is reversed in part and affirmed in part, and the case is remanded for a determination by the district court of the appropriate relief to be accorded to the plaintiffs for the period ensuing after the entry November 5, 1980, of the amended judgment and prior to the April 1, 1981 amendment of sec. 49.19(4) (b), Wis. Stat. Costs to be borne by the respective parties.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILDRED DAUBERT, et al.,
Plaintiffs,

v. No. 73-C-11

DONALD E. PERCY, et al.,
Defendants.

AMENDED JUDGMENT

The plaintiffs filed a complaint demanding a permanent injunction. The plaintiffs and defendants agreed upon the entry of a judgment in this action and entered into a stipulation. The court signed a consent judgment in accordance with the stipulation on June 1, 1973. On August 22, 1980, the defendants moved for relief from the judgment. The court considered the briefs and affidavits submitted by the parties and issued its decision and order, dated October 21, 1980, granting the motion for relief from judgment.

Now, therefore, the judgment is amended to reflect the granting of the motion for relief as follows:

1. Defendants are permanently enjoined from relying upon the presumption that general relief granted under § 49.01 *et seq.*, Wis. Stats. (1971), has met need unless the amount of such general relief is more than or equal to the grant of financial assistance to which the applicant was entitled under the categorical assistance program for which the application was made. Where the entitlement for financial assistance under the categorical assistance program exceeds the dollar amount of budgetable income (including the dollar amount of all general relief) received for the period after the effective date of eligibility for the categorical assistance program and

before the end of the first benefit month, the applicant will be provided with a grant of financial assistance that represents this difference.

2. In all cases in which an applicant for categorical assistance has been receiving general relief during the period after the effective date of eligibility for the categorical assistance program and before the end of the first benefit month, the above named and above described defendants shall make such adjustments or payments as are necessary to remove obligations that the applicant has incurred during that period under § 49.08, Wis. Stats. (1971), to the general relief conferring jurisdiction or jurisdictions. This requirement shall be applied only in situations in which such general relief has been provided in a manner consistent with the principle of non-restrictive money payment.

3. Written notices will be sent to all persons whose applications for categorical assistance have been approved. Such notices will indicate the following: (i) that the application for financial assistance has been approved and the date on which entitlement became effective; (ii) the amount of financial assistance that will be provided in the monthly grant after the first benefit month; (iii) the amount of financial assistance that will be provided in the first benefit month; (iv) in appropriate cases, whether any adjustments or payments have been or will be made pursuant to para. 3, *supra;* and (v) that the applicant has a right to request a fair hearing to appeal any decision of the county welfare department and the method by which such hearing may be obtained. Defendant Donald E. Percy shall provide all directors of county welfare departments with a copy of the appropriate form which shall be used for this purpose.

4. Defendant Donald E. Percy shall within fifteen (15) days of receipt of notice of entry of this judgment

cause a copy of this judgment and the form described in para. 4, *supra*, to be mailed to the director of each county welfare department in the state of Wisconsin with instructions to provide copies of this order to all caseworkers, case aides, intake workers and all other persons employed by county welfare departments and responsible in any way for processing applications for financial assistance under the categorical assistance programs.

5. The provisions of this amended judgment shall be effective for all applications for assistance under the categorical assistance programs which were approved subsequent to April 4, 1973.

6. This amended judgment shall be binding upon the named defendant, his agents, employes, successors in office, assistants, and upon all other persons acting in concert or cooperation with him or at his direction or under this control, including directors and employes of all county welfare departments in the state of Wisconsin, so long as such persons received actual notice of the amended judgment by personal service or otherwise.

Dated at Milwaukee, Wisconsin, this 5th day of November, 1980.

/s/ Myron L. Gordon
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILDRED DAUBERT and
ETHEL ROYSTER, individually
and on behalf of all other
persons similarly situated,
Plaintiffs,

vs. No. 73-C-11

WILBUR J. SCHMIDT, et al.,
Defendants.

DECISION and ORDER

Before the court is the motion of the defendants for relief from the consent judgment entered in this action on June 1, 1973. This motion is brought pursuant to Rule 60(b) (5), Federal Rules of Civil Procedure, by Donald E. Percy, the successor in office to Wilbur J. Schmidt as secretary of the Department of Health and Social Services for the state of Wisconsin (DHSS).

This action originally arose as an action brought against Mr. Schmidt and DHSS to declare "that the defendant's failure to make awards of categorical assistance retroactive to the first of the month in which the application is made to persons who received general relief during the pendency of their application violates rights secured by [various constitutional and statutory provisions] ...." Para. 3, Prayer for Relief, Verified Complaint, p. 10 (filed January 9, 1973). Injunctive relief was sought.

The parties subsequently agreed to settle the action and prepared a consent judgment for entry by the court. The judgment was entered on June 1, 1973. The first paragraph of the consent judgment provided:

> "Defendant WILBUR J. SCHMIDT, as Secretary of the Wisconsin Department of Health and Social Services, and [others], are hereby permanently enjoined from failing to make grants of financial assistance under the categorical assistance programs known as Blind Aid, § 49.18, WIS. STATS. (1971), Aid to Families with Dependent Children, § 49.19, WIS. STATS. (1971), Old Age Assistance, §§ 42.22 *et seq.*, WIS. STATS. (1971), and Disabled Aid, § 49.61, WIS. STATS. (1971) retroactive to the first of the month in which such financial assistance is applied for and eligibility is shown to have existed."

The mandate contained in the 1973 judgment has continued in effect to this date. However, earlier in the present year Mr. Percy as head of DHSS determined that budgetary problems required that DHSS reduce its expenditures. One proposed cost-cutting measure was to change the DHSS policy of paying benefits made under Aid to Families with Dependent Children program (AFDC). Up to that time, such benefits were made retroactive to the first day of the month in which a completed application was submitted if eligibility was shown to exist as of the first of that month. *See* Income Maintenance Manual of DHSS, § III-D-12(6)(b). It was proposed to alter that policy to pay benefits as of the date of entry of the application into the state computer system, or twenty-nine days from the date of the application, whichever was less.

On September 2, 1980, I held a hearing on the plaintiffs' motion to find the defendants in contempt for violating the terms of the 1973 consent judgment. While I declined to find the defendants in contempt, I did find that the proposed policy change violated the literal terms of paragraph one of the 1973 consent judgment. DHSS has continued to comply with the

policy required by the 1973 judgment, pending resolution of the motion now before the court.

The plaintiffs urge that Mr. Percy errs in referring to the policy of granting AFDC eligibility retroactive to the first of the month of application as a "voluntary" policy; it is, as the plaintiffs point out, a policy ordered by the court. Nevertheless, the court does have the power to modify this injunction even though it was the product of an agreement between the parties. The defendants aptly quote Justice Cardozo's comment in United States v. Swift & Co., 286 U.S. 106, 114-15 (1932):

> "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent .... A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. ... [A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong." (citations omitted).

The defendant has moved for modification pursuant to Rule 60(b) (5), Federal Rules of Civil Procedure. The portion of that rule relevant to this case provides that a party may be relieved from a final judgment if "it is no longer equitable that the judgment should have propsective application." The court of appeals for the seventh circuit has interpreted Rule 60(b) (5) to require the movant to show "how continued enforcement of the injunction works an injustice or constitutes a 'grievous wrong.'" De Filippis v. United States, 567 F.2d 341, 344 (7th Cir. 1977) (citing *Swift, supra).* Determinating whether an injunction should be modified is left to the discretion of

the trial court. International Nikoh Corp. v. H.K. Porter Co., 374 F.2d 82 (7th Cir. 1967); Wright & Miller, Federal Practice and Procedure: Civil § 2857.

The plaintiffs have argued that under *De Filippis* the defendants must demonstrate changed circumstances that make continued enforcement of the injunction a "grievous wrong"; the defendants have urged that such changed circumstances exist. The defendants place great weight on the fact that three of the four categorical aid programs mentioned in paragraph one of the 1973 judgment are no longer administered by the state. The three programs (old age assistance, blind aid, and disabled aid) were repealed in favor of federal administration. The defendants argue that this removes a major basis for the original lawsuit and the 1973 judgment.

There are two answers to the defendants' argument. First, the AFDC program, which is the subject of the controversy at bar, is still in fact administered by the state. Its status has not been altered in any way. Secondly, the change in the other three categorical aid programs became effective on January 1, 1974. Thus the change in the program administration occurred over five years ago. It is a little difficult, at this late date, to regard this alteration as a "changed circumstance" sufficient to justify modification of this injunction.

In addition to the "changed circumstances" test in *De Filippis,* I believe that such case permits a broader consideration in resolving the issue of amending the judgment. The party desiring modification may also show that continued enforcement of the injunction "works an injustice." *De Filippis,* p. 344. I am convinced that further enforcement of paragraph one of the 1973 judgment will indeed work a significant injustice sufficient to warrant modification of the injunction.

My determination regarding continued enforcement of this injunction is supported by an examination of the gravamen of the original action. At the time of the commencement of this lawsuit, the state maintained the four categorical aid programs and a general relief program. The four programs were governed by both state and federal regulations. The general relief program was entirely a state program administered by county welfare agencies. Wis. Stat. § 49.01 *et seq.* As noted above, the plaintiffs in the original action were concerned about applicants in the four categorical programs who first received general relief from the state. The complaint alleges that DHSS would not grant financial assistance to applicants for aid under the four programs for any period when the applicant had received general relief. DHSS had a presumption that the aid from the general relief program was sufficient to provide for the applicant's needs.

This presumption had the result that those who received general relief prior to a finding of eligibility for the four programs were treated less favorably than those applicants for the four programs who did not receive general relief. A fair reading of the original complaint reveals that it was this differential treatment that was challenged on constitutional and statutory grounds.

The underlying lawsuit was not an action to require DHSS to pay benefits under the four programs retroactive to the first day of the month when the application was filed; that policy was in effect prior to the filing of the lawsuit and was not directly affected by the lawsuit. The relief sought by the plaintiffs in 1973 was a requirement that DHSS apply this policy *uniformly* to all applicants for aid under the four categorical aid programs, irrespective of whether an applicant had received general relief or not.

DHSS is not required by any statute or regulation to maintain this policy. DHSS was and is permitted to pay benefits in this manner if it wishes. 45 C.F.R. § 206.10(a) (6); Wis. Adm. Code, § PW-PA 20.11. These regulations give DHSS discretion to set the timing of the commencement of benefits within certain limits. The proposed change in policy is within those regulatory requirements.

Thus the 1973 judgment is the only constraint that exists to prevent DHSS from changing its policy regarding the time for commencement of benefits. While the literal terms of paragraph one of the 1973 judgment require this result, it is clear that when the 1973 judgment is read in its entirety, its purpose is to end the disparate treatment between those who received general relief and those who did not. Paragraphs 2, 3 and 4 directly support this interpretation. I am convinced that it would be an injustice to interpret the 1973 judgment in the manner the plaintiffs wish when the effect should be far greater than that necessary to achieve the relief originally sought. This is especially so when the desired interpretation completely removes all administrative discretion from the agency that has been properly given it in the statutory framework.

The plaintiffs argue that they had significant statutory and constitutional arguments in 1973, the airing of which the consent judgment foreclosed. This is probably true, but it is not a justification for the interpretation urged by the plaintiffs. The complaint did not seek as relief the interpretation that the plaintiffs now advance, and the plaintiffs concede that then, as now, the applicable rules permitted the policy change sought by the defendants. Thus the plaintiffs' argument that the modification sought will in some way deprive the plaintiffs of their right fully to litigate this action is not persuasive.

The defendants have put forward the budgetary problems faced by DHSS and the state of Wisconsin as a changed circumstance sufficient to justify modification of the injunction. The plaintiffs in turn argue that these budgetary problems are not sufficient and cite considerable case law in support of that position. I am mindful of the problems outlined in Mr. Percy's affidavit, and I do not base this decision on them. I believe that it is the wiser use of the court's discretion to analyze this question solely in terms of the effect that the literal provisions of this injunction has on the proper discretion of DHSS. Therefore I do not reach the issue whether the budgetary problems outlined are a sufficient change in circumstances to justify modification of this injunction. I am persuaded that the operation of this injunction totally curtails the discretion of DHSS in this area and that this is an injustice that warrants relief from the 1973 judgment. Accordingly, the defendants' motion for relief will be granted and paragraph one of the 1973 judgment will be vacated.

The defendants have not provided the court with any guidance as to how the amended injunction should read. The defendants are requested to serve and file a proposed injunction within ten days which will be consistent with this opinion and will continue to require DHSS to grant AFDC aid to recipients of general relief in the same manner as AFDC aid is granted to those who do not receive general relief. The plaintiffs will then be permitted ten days to submit any objection they may have to the defendants' proposed injunction.

Therefore, IT IS ORDERED that the defendants' motion for relief from judgment be and hereby is granted.

Dated at Milwaukee, Wisconsin this *21* day of October, 1980.

/s/ Myron L. Gordon
U.S. District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILDRED DAUBERT, et al.,
Plaintiffs

vs.

WILBUR J. SCHMIDT, et al.,
Defendants.

JUDGMENT
Civil Action No.
73-C-11

The plaintiffs have filed their complaint demanding a permanent injunction as appears more fully by said complaint and prayer for relief therein, and the plaintiffs and defendants having agreed upon a basis for the adjudgment of the matters alleged in the complaint and the entry of a judgment in this action, and having entered into a stipulation, the original of which is being filed with the Court, and due deliberation being had thereon, now, on motion of counsel for the plaintiffs,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that final judgment in favor of the plaintiffs and against the defendants is hereby granted and ordered entered as the judgment in this action as follows:

1. Defendant WILBUR J. SCHMIDT, as Secretary of the Wisconsin Department of Health and Social Services, and his agents, employees, successors in office, assistants, and all others acting in concert or cooperation with him or at his direction or under his control, including the Directors and employees of all county welfare departments in the State of Wisconsin, are hereby permanently enjoined from failing to make

grants of financial assistance under the categorical assistance programs known as Blind Aid, § 49.18, WIS. STATS. (1971), Aid to Families with Dependent Children, § 49.19, WIS. STATS. (1971), Old Age Assistance, §§ 42.22 *et seq.*, WIS. STATS. (1971), and Disabled Aid, § 49.61, WIS. STATS. (1971), retroactive to the first of the month in which such financial assistance is applied for and eligibility is shown to have existed.

2. In making the determination under para. 1, *supra,* defendants are permanently enjoined from relying upon the presumption that general relief granted under § 49.01 *et seq.*, WIS. STATS. (1971), has met need unless the amount of such general relief is more than or equal to the grant of financial assistance to which the applicant was entitled under the categorical assistance program for which the application was made. Where the entitlement for financial assistance under the categorical assistance program exceeds the dollar amount of budgetable income (including the dollar amount of all general relief) received during the pendency of the application, the applicant will be provided with a grant of financial assistance that represents this difference.

3. In all cases in which an applicant for categorical assitance found to be eligible under para. 1, *supra,* has been receiving general relief during the pendency of his application, the above-named and above described defendants shall make such adjustments or payments as are necessary to remove all obligations that the applicant has incurred under § 49.08, WIS. STATS. (1971), to the general relief-conferring jurisdiction or jurisdictions. This requirement shall be applied only in situations in which such general relief has been provided in a manner consistent with the principle of a non-restrictive money payment.

4. Written notices will be sent to all persons whose applications for categorical assistance have been approved. Such notices will indicate the following: (i) that the application for financial assistance has been approved and the date on which entitlement became effective; (ii) the amount of financial assistance that will be provided in the monthly grant; (iii) in appropriate cases, whether any awards of financial assistance will be granted retroactively as required by para. 1, *supra*, or, if no such awards are to be granted, the reason(s) why; (iv) in appropriate cases, whether any adjustments or payments have been or will be made pursuant to para. 3, *supra;* and (v) that the applicant has a right to request a fair hearing to appeal any decision of the county welfare department and the method by which such hearing may be obtained. Defendant WILBUR J. SCHMIDT shall provide all directors of county welfare departments with a copy of the appropriate form which shall be used for this purpose.

5. Defendant WILBUR J. SCHMIDT shall within fifteen (15) days of receipt of notice of entry of this judgment cause a copy of this judgment and the form described in para. 4, *supra*, to be mailed to the director of each county welfare department in the State of Wisconsin with instructions to provide copies of this order to all caseworkers, case aides, intake workers and all other persons employed by county welfare departments and responsible in any way for processing applications for financial assistance under the categorical assistance programs.

6. Within thirty (30) days of the receipt of this Judgment defendant WILBUR J. SCHMIDT shall cause to be held a hearing for the plaintiffs, MILDRED DAUBERT and ETHEL ROYSTER. The purpose of said hearing shall be to determine the amount of assistance to which said plaintiffs were

entitled for the period beginning the first of the month in which assistance under the categorical assistance programs was applied for and eligibility is shown to have existed and ending on the date for which assistance under the categorical assistance programs was granted. An order shall then be entered requiring the Milwaukee County Department of Public Welfare to provide said plaintiffs with any amount due in accordance with the provisions of para. 2 of this Judgment. The order shall also require the Milwaukee County Department of Public Welfare to make such adjustments as are necessary in accordance with the provisions of para. 3 of this Judgment.

7. The provisons of this judgment except for paragraph 6, shall be effective for all applications for assistance under the categorical assistance programs which were approved subsequent to April 4, 1973.

8. This judgment shall be binding upon the named defendant, his agents, employees, successors in office, assistants, and upon all other persons acting in concert or cooperation with him or at his direction or under his control, including the directors and employees of all county welfare departments in the State of Wisconsin, so long as such persons received actual notice of the judgment by personal service or otherwise.

Dated at Milwaukee, Wisconsin, this *1* day of June, 1973.

BY THE COURT:

/s/ Myron L. Gordon
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

MILDRED DAUBERT, et al.,
Plaintiffs,

v. Civil Action No. 73-C-11

WILBUR J. SCHMIDT, et al.,
Defendants.

AFFIDAVIT OF DONALD E. PERCY

STATE OF WISCONSIN)
) ss.
DANE COUNTY)

DONALD E. PERCY, being duly sworn on oath deposes and says that:

1. I am the secretary of the Wisconsin Department of Health and Social Services and am responsible for the management of the Department and the administration of programs for which the Department is responsible, including the program for aid to families with dependent children (AFDC).

2. Since prior to 1973 until the present, the Department has exercised its discretion accorded by law to establish the initial payment date for AFDC recipients to be the first day of the month in which a completed application is submitted if eligibility is shown to exist as of the first of the month, and the Department has considered this to be a voluntary, not compelled, policy.

3. On or about July 2, 1980, I received a letter from the Secretary of the Wisconsin Department of Administration informing me that state revenues for the 1980-81 fiscal year are estimated to be 4.4% below

the amounts appropriated by the Legislature and directing me to reduce departmental expenditures to accommodate the revenue deficiency. A copy of the letter is attached hereto as Exhibit 1.

4. The Department immediately undertook to determine how departmental expenditures could be reduced in response to the revenue shortfall, taking into account administrative, fiscal, and legal considerations.

5. With respect to the AFDC program, there is little latitude for modification due to constraints imposed by federal regulations. Noncompliance with federal regulations subjects the Department to loss of federal participation in the AFDC program and other federal funds.

6. I have determined that the only way to reduce expenditures adequately and fairly under the AFDC program, within the latitude allowed by federal law, is to change the policy on initial payments to AFDC recipients.

7. On August 13, 1980, I appeared before a legislative committee to announce the Department's plans for department-wide reductions in expenditures to cope with the revenue deficiencies.

8. It was at the hearing on August 13, 1980, that I was first made aware that the proposed change in policy in the AFDC program could be considered to be foreclosed by a 1973 consent judgment.

/s/ D.E. Percy
DONALD E. PERCY

Subscribed and sworn to before me
this *11th* day of September, 1980.
/s/ Mary A. Hochstetter
Notary Public, State of Wisconsin
My Commission: *Expires 12/6/81*

EXHIBIT 1

July 2, 1980

Don Percy
Health & Social Services
663, 1 W. Wilson St.
Madison, WI 53702

Dear Mr. Percy:

After careful review of the fiscal condition of the state, I am advising you that the GPR and LTR amounts available for expenditure in the 1980-81 fiscal year are estimated to be 4.4% below the appropriated level.

Given these circumstances, I am directing that allotments made against GPR or LTR appropriations be 4.4% below the appropriated levels.

While we see nothing at this time that would suggest any improvement in collections during the next fiscal year, should revenue estimates improve, I will notify you of any restorations in allowed expenditure levels. I must add, however, that your planning should be based on the 4.4% reduction for the full year.

Detailed instructions will be transmitted later this month.

Sincerely,

/s/ Kenneth E. Lindner
Kenneth E. Lindner, Secretary
Department of Adminstration

KEL:tab/7971A/7972A

APPENDIX G

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

MILDRED DAUBERT and ETHEL ROYSTER, individually and on behalf of all other persons similarly situated,
Plaintiffs,

vs. No. 73-C-11

WILBUR J. SCHMIDT, individually and as Secretary of the Wisconsin Department of Health and Social Services, and his agents, employees, successors in office, assistants and all others acting in concert or cooperation with him or at his direction or under his control,
Defendant.

VERIFIED COMPLAINT
[Equitable Relief Sought]

1. This is an action for declaratory and injunctive relief on behalf of a class of persons whose awards of financial assistance under the categorical assistance programs of the Social Security Act of 1935, 42 U.S.C. §§ 301 *et seq.* are not made retroactive to the first of the month in which they apply *because* the applicant has been recieving general relief under §§ 49.01 *et seq.*, WIS. STATS. (1969), while their applications were pending. Such policy is challenged as violating rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, by the Social Security Act, and by Department of Health, Education and Welfare (HEW) Regulations issued thereunder.

JURISDICTION AND RELATED MATTERS

2. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331 and 1343. This action is authorized by 42 U.S.C. § 1983 and 1988. Declaratory relief is sought under 28 U.S.C. §§ 2201 and 2202. The amount in controversy, exclusive of interest and costs, exceeds ten thousand dollars ($10,000.00).

PARTIES

3. Plaintiff Mildred Daubert is an adult resident of Milwaukee County and of the State of Wisconsin and has been receiving financial assistance under the program of Disabled Aid under § 49.61, WIS. STATS. (1969), since June 1, 1971.

4. Plaintiff Ethel Royster is an adult resident of Milwaukee County and of the State of Wisconsin and has been receiving financial assistance under the program of Blind Aid under § 49.18, WIS. STATS. (1969), since September 1, 1972.

5. Defendant Wilbur J. Schmidt, an adult resident of the State of Wisconsin, is Secretary of the Wisconsin Department of Health and Social Services (hereafter "DHSS") and in that capacity is responsible for the supervision of the categorical assistance programs under which Wisconsin provides financial assistance to needy persons in the form of Blind Aid, § 49.18, WIS. STATS. (1969), Aid to Families with Dependent Children, § 49.19, WIS. STATS. (1969), Old Age Assistance, §§ 49.22 *et seq.*, WIS. STATS. (1969), and Disabled Aid, § 49.61, WIS. STATS. (1969). [These programs are hereafter referred to as the "categorical assistance" programs.]

6. Defendant is sued individually and in his official capacity. Relief is also sought against his agents, employees, successors in office, assistants and all other persons acting in concert or cooperation with

the named defendant or at his direction or under his control.

7. Defendant, individually and in concert with others, has been, is presently and will continue to be acting under color of authority and law of the State of Wisconsin in refusing to grant financial assistance under the categorical assistance programs of the Social Security Act retroactive to the first of the month in which they applied where the applicant has received general relief during the pendency of their applications.

CLASS ACTION

8. Plaintiffs Mildred Daubert and Ethel Royster bring this action on their own behalf and, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of the class consisting of all persons whose applications for financial assistance under the categorical assistance programs have been acted upon favorably but whose awards of financial assistance were not made retroactive to the first of the month in which they applied *because* they had received general relief during the pendency of their application. With respect to these classes:

(a) they are so numerous that joinder of all members is impracticable, i.e., on information and belief, each year more than 500 persons in Wisconsin found to be eligible for financial assistance under the categorical assistance programs receive an award of financial assistance which is not retroactive to the first of the month of their application because they had been receiving general relief;

(b) there are questions of law and fact common to the class;

(c) the claims of named plaintiffs are typical of the claims of the class they seek to represent;

(d) the named plaintiffs will fairly and adequately protect the interest of these classes;

(e) the defendants have acted and refused to act on grounds generally applicable to the class, thus making appropriate final injunctive relief as to the class as a whole; and,

(f) questions of law and fact common to the members of the class predominate over questions affecting only individual members, and a class action is superior to other methods for a fair and efficient adjudication of the suit.

BACKGROUND

9. Wisconsin participates in the federal government's categorical assistance programs known as Old Age Assistance, Aid to Families with Dependent Children, Blind Aid and Aid to the Permanently and Totally Disabled established by Titles I, IV-A, X and XIV of the Social Security Act, 42 U.S.C. §§ 301 *et seq.* As a condition of receiving federal funds under these programs, Wisconsin is required to maintain a state plan which conforms with the requirements of the Social Security Act and the HEW Regulations issued thereunder.

10. The categorical assistance programs in Wisconsin are administered by county welfare agencies, the activities of which are supervised by the DHSS.

11. At all times relevant herein, HEW Regulations have provided that the entitlement for financial assistance under the categorical assistance programs may begin on the first of the month in which an application has been received and the individual meets all the eligibility conditions. 45 C.F.R. § 206.10(a) (6).

12. At all times relevant herein, HEW Regulations have provided that in establishing the amount of the assistance payment all income and resources will be considered. Such regulations also provide that "only such net income as is actually available for current use on a regular basis will be considered ..." 45 C.F.R. § 233.20(a) (3) (ii) (c).

13. Wis. Adm. Code § PW-PA 20.11(4) permits categorical assistance to be granted retroactive to the first of the month in which application for such assistance is made.

14. In those cases in which an applicant is found to be eligible to receive financial assistance under any of the categorical assistance programs, it is the policy of the DHSS under Wis. Adm. Code § PW-PA 20.11(4) to have the grant of financial assistance made retroactive to the first of the month in which the application was made for all periods when the applicant met eligibility conditions.

15. Despite the policy as described in the preceding paragraph, no financial assistance will be granted to cover a period in which the applicants received assistance under the general relief program which is administered in Wisconsin by units of local government pursuant to § 49.01 *et. seq.* WIS. STATS. (1969). This policy of the DHSS is summarized in a memo of Frank R. Pokorny, Financial Assistance Supervisor of the Milwaukee County Department of Public Welfare, which reproduces the February 8, 1972

letter of Ms. Karen Zahn of the DHSS. A true copy of this memo is appended hereto as Exhibit A.

16. It is the policy of the DHSS to presume that general relief provides for an individual's needs.

17. It is the policy of the DHSS that the above presumption will not be rebutted by a showing that the amount of financial assistance that a person received under the general relief program was less than the amount such person would have received under the categorical assistance program for which they were found eligible.

18. Where the income of an applicant for categorical assistance from sources other than another categorical assistance program or general relief (e.g., from a private pension plan or Old Age Survivors and Disability Insurance benefits) is less than the amount of the categorical assistance the individual would have received during that period, it is the policy of the DHSS to make an initial grant of categorical assistance for eligible persons which includes the amount by which such other income fell short of the categorical assistance grant level.

19. Where an applicant for categorical assistance has income from general relief in an amount that is less than the amount of categorical assistance that individual was eligible to receive during the period in which his application was pending, it is the policy of the DHSS not to include the amount by which such general relief fell short of the categorical assistance grant level in the initial grant of categorical assistance.

20. Unlike the general relief program under which recipients of financial assistance are legally obligated under § 49.08, WIS. STATS. (1969), to the relief-conferring jurisdiction for the relief they received,

there is no claim, lien or recovery provision of any kind legally obligating a recipient of Disabled Aid or Blind Aid to pay back to the state or counties of Wisconsin the financial assistance they received.

MILDRED DAUBERT

21. Plaintiff Mildred Daubert applied to the Milwaukee County Department of Public Welfare for financial assistance under the Disabled Aid categorical assistance program on June 11, 1970. On May 28, 1971, Mildred Daubert was determined to be eligible for such categorical assistance and she was granted such assistance on June 1, 1971. She has been receiving Disabled Aid since that date.

22. On July 14, 1972, a decision was rendered by the DHSS in an administrative hearing held under § 49.50(8), WIS. STATS. (1969), in which Mildred Daubert's request for a grant of Disabled Aid for the twelve-month period from June, 1970 to and including May, 1971 was denied because she had received general relief from the MCDPW during this period. The conclusion of the DHSS was that

> "... this Department has for many years held that general assistance presumptively provides for basic needs and that the record will not permit us to conclude that petitioner is now eligible for a grant of Disabled Aid for the period from June 1, 1970 through May, 1971 since there is nothing in the record to show that petitioner's needs were in fact not met and where there is no need there can be no eligibility." *In the Matter of the Petition of Mildred Daubert.* (DHSS Hearing No. 8529)

23. The above decision was reached despite the uncontroverted testimony at the hearing by a representative of the Milwaukee County Department of Public

Welfare which established that the general relief received by Mildred Daubert was less than the categorical assistance she was entitled to have received during the same period.

24. During the twelve-month period from June 1, 1970 to June 1, 1971 while Mildred Daubert's application for Disabled Aid was pending she received $1,465.00 in general relief from the Milwaukee County Department of Public Welfare and thereby incurred an obligation to Milwaukee County under §49.08, WIS. STATS. (1969) for this amount. Had Mildred Daubert been receiving Disabled Aid during this period, she would not have incurred any obligation to either Milwaukee County or the State of Wisconsin.

ETHEL ROYSTER

25. Plaintiff Ethel Royster's application to the Milwaukee County Department of Public Welfare for financial assistance under the Blind Aid categorical assistance program was approved on July 25, 1972 and she began receiving a grant of blind aid effective September 1, 1972.

26. On December 20, 1972, a decision was rendered by the DHSS in an administrative hearing held under § 49.50 (8), WIS. STATS. (1969), in which Ethel Royster's request for a payment of Blind Aid retroactive to the first of the month in which she applied was denied. The reason given for such denial was as follows:

> "Petitioner was a recipient of general assistance from November 1, 1971 to September 1, 1972. The general assistance she received was extended to provide for her basic needs. Those needs were presumptively met by the general assistance program for the ten months at issue. The evidence offered by

petitioner at the hearing is insufficient to rebut this presumption. The record will not permit us to conclude that petitioner is entitled to a retroactive grant of blind aid for the period from November 1, 1971 to September 1, 1972 or for a shorter period of time ending September 1, 1972." *In the Matter of the Petition of Ethel Royster.* (DHSS Hearing No. 9980)

27. The above decision was reached despite the uncontroverted testimony at the hearing by representatives of the Milwaukee County Department of Public Welfare which established that the general relief received by Ethel Royster was less than the categorical assistance she was entitled to have received during the same period.

28. During the period in which Ethel Royster's application for Blind Aid was pending she received general relief from the Milwaukee County Department of Public Welfare in an amount of more than $600.00 and thereby incurred an obligation to Milwaukee County under § 49.08, WIS. STATS. (1969) for this amount. Had Ethel Royster been receiving Blind Aid during this period, she would not have incurred such an obligation to either Milwaukee County or the State of Wisconsin.

CLAIM FOR RELIEF

29. Defendant's policy and practice of failing to make grants of categorical assistance retroactive to the first of the month in which the application was made in those cases in which the applicant received general relief violates rights secured plaintiffs and all other persons similarly situated:

(a) Under the Social Security Act, 42 U.S.C. §§ 301 *et seq.;*

(b) Under the HEW Regulations prohibiting the attribution of income not actually available for current use, and requiring income to be reasonably evaluated. 45 C.F.R. § 233.20(a) (3) (ii) (c) and (e);

(c) Under HEW's Equitable Treatment Doctrine which requires that determination of need and amount of assistance be made on an objective and equitable basis, 45 C.F.R. §§ 205.120, 205.130, § 233.10(a) (1) and 233.20(a) (1);

(d) Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution by creating an irrebutable or conclusive presumption that assistance granted under general relief meets the needs of persons under the categorical assistance programs;

(e) Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by creating an irrational classification of persons similarly situated based on the source rather than the amount of their income.

EQUITABLE RELIEF

30. Plaintiffs have no adequate remedy at law and no available administrative remedies. Plaintiffs Mildred Daubert and Ethel Royster have had administrative hearings under § 49.50(8), WIS. STATS. (1969), at which the DHSS has failed to redress their grievances.

31. Plaintiffs and the class they represent have suffered and will continue to suffer irreparable injury unless the Court enjoins defendant from failing to

make retroactive awards of financial assistance to persons who have been found eligible for categorical assistance because such person had received general relief during the pendency of their application.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

1. Assume jurisdiction of this cause;

2. Enter an order that this action may be maintained as a class action;

3. Enter a judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that defendant's failure to make awards of categorical assistance retroactive to the first of the month in which the application is made to persons who received general relief during the pendency of their application violates rights secured by the Equal Protection and Due Process Clauses of the Constitution of the United States and the Social Security Act and the HEW Regulations issued thereunder;

4. Enter a permanent injunction restraining defendants and their agents, employees, successors in office, assistants and all others acting in concert or cooperation with them or at their direction or under their control from failing to make awards of categorical assistance retroactive to the first of the month in which the application is made solely because the applicant has been receiving general relief (a) where such general relief is of an amount that is less than the categorical assistance to which the applicant is entitled, and (b) where there is a duty to repay such general relief but not the categorical assistance being applied for;

5. Award plaintiffs and all others similarly situated all amounts of categorical assistance that have been wrongfully withheld;

6. Retain jurisdiction of the subject matter of this complaint until all the requirements of this Court and of the judgment herein are satisfied;

7. Award plaintiffs their costs and disbursements incurred herein; and

8. Award plaintiffs such further and other relief as may seem just and equitable.

Dated at Milwaukee, Wisconsin, this 9 day of January, 1973.

/s/ Steven H. Steinglass
STEVEN H. STEINGLASS
Attorney for Plaintiffs

P.O. ADDRESS:

FREEDOM THROUGH EQUALITY, INC.
152 West Wisconsin Avenue
Suite 735
Milwaukee, Wisconsin 53203
Area Code 414/271-7772

EXHIBIT A

COUNTY OF MILWAUKEE
Interoffice Communication

March 1, 1972

Financial Assistance Division Staff

Financial Assistance Supervisor IV

Eligibility Date Disabled Aid/Blind Aid Application (Karen Zahn letter dated 2-8-72)

The following provides clarification on the effective date of eligibility for Disabled or Blind Aid applications when there is a time lag in the date of application and the date of determination by the Medical Review Panel in Madison.

Eligibility for a money payment becomes effective on the date the applicant meets all the requirements of eligibility, assuming that the physical condition(s), on which the Medical Review Panel based their decision, existed on the date that the request (application) was signed.

Rule PW-PA-20.11 states that, "initial payment may include the needs to the first of the month which aid is applied for and eligibility is shown to have existed as of the first of such month." However, if the person applying during a month did not meet all eligibility requirements until the 8th or 9th of the month he applied, he would be eligibile from that date, rather than on the first of the month he applied.

An example of such a case would be a person disabled as a result of a car accident on the 8th of the month. Here, prorate the amount of the payment for the initial month according to the number of days of eligibility. Compute a budget to include the Basic Allowance, Shelter and allowable continuing special needs. Use

the total amount for a full month, divide by 30 and multiply by the number of days of eligibility.

Recently, a Blind Aid application had been signed in April 1971. The Medical Review Panel determined eligibility in October 1971. The facts in this case, however, established that eligibility for a Blind Aid money payment had existed on April 1, 1971, with the Medical Assistance being effective February 1, 1971. Payment was made retroactively.

Categorical aid payments shall not duplicate General Assistance payments. If General Assistance has been granted to the applicant during the time in which the categorical relationship for Disabled/Blind Aid is being established, the date of the categorical aid payment may not overlap the period of General Assistance.

/s/ Frank R. Pokorny
Frank R. Pokorny

FRP:nh
cc FAD Staff Policy and Procedure Distribution

Opposition

Office - Supreme Court, U.S.
FILED
DEC 3 1981
ALEXANDER L. STEVAS,
CLERK

81-966

In The

Supreme Court

Of The United States

DONALD E. PERCY,

Petitioner,

v.

MILDRED DAUBERT and
ETHEL ROYSTER, Individually
and on behalf of all other
persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

MARGARET VERGERONT
PATRICIA McMAHON
Attorneys for Respondents

LEGAL ACTION OF WISCONSIN, INC.
31 South Mills Street
Post Office Box 9686
Madison, WI 53715
608/256-3304

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In The

Supreme Court

Of The United States

DONALD E. PERCY,

Petitioner,

v.

MILDRED DAUBERT and
ETHEL ROYSTER, Individually
and on behalf of all other
persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED FOR REVIEW

1. Does the provision of Fed.R.Civ.P 60(b)(5), "that it is no longer equitable that the judgment should have prospective application," require the moving party to show changed and unforeseen circumstances which will cause hardship if relief is not granted?

2. Assuming this Court will permit a ground for relief under Fed.R.Civ.P 60(b) to be raised for the first time in this Petition, has petitioner shown that he meets the standard of Rule 60(b)(6)?

STATEMENT OF THE CASE

Respondents accept the Statement of the Case contained in the Petition but makes the following additions.

The paragraph of the June 1, 1973, judgment from which defendant below, petitioner before this Court, sought relief is the following:

> "[Defendants] are hereby permanently enjoined from failing to make grants of financial assistance under the categorical assistance programs known as Blind Aid, sec. 49.18, WIS. STATS. (1971), Aid to Families with Dependent Children, sec. 49.19, WIS. STATS. (1971), Old Age Assistance, sec. 42.22 *et seq.* WIS. STATS. (1971), and Disabled Aid, sec. 49.61 WIS. STATS. (1971), retroactive to the first of the month in which such financial assistance is applied for and eligibility is shown to have existed."

Petitioner's motion requested relief pursuant to Fed.R.Civ.P. 60(b)(5) on the ground that continued enforcement of the cited paragraph was no longer equitable. On appeal to the United States Court of Appeals for the Seventh Circuit, plaintiffs below, respondents before this Court, argued that the district court had applied an incorrect legal standard in interpreting Rule 60(b)(5). Petitioner argued that the interpretation of Rule 60(b)(5) was correct. At no time before the district court or the Court of Appeals did petitioner assert that he is entitled to relief from judgment under Rule 60(b)(6), and that ground for relief was not addressed by either court.

With regard to the amendment to 49.19(4)(b), WIS. STATS. (1979) effective April 1, 1981[1], which amendment occurred prior to oral argument before the Court of Appeals, respondents conceded at oral argument that this legislative change was a ground for modification of the judgment as of April 1, 1981, and therefore they do not contest the correctness of the decision of the Court of Appeals on that point.

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[1]Section 21, Chapter 1, Laws of 1981

SUMMARY OF ARGUMENT

Respondents contend that the Petition for a Writ of Certiorari should not be granted because the decision of the Court of Appeals for the Seventh Circuit interprets Fed.R.Civ.P. 60(b)(5) in a manner consistent with the decisions of this Court and courts of other circuits. Respondents further contend that this Court should not review the question of whether petitioner is entitled to relief under Rule 60(b)(6), since that question was not raised by petitioner before either the district court or the Court of Appeals. Moreover, it is respondents' position that petitioner is not entitled to relief under Rule 60(b)(6) as that provision has been interpreted by the decisions of this Court.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT INTERPRETING FED.R.CIV.P. 60(b)(5) IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND WITH THE DECISIONS OF OTHER CIRCUITS.

A. *The Promulgation of Rule 60(b)(5) Did Not Change the Standard for Granting Relief from an Injunction on the Grounds that Continued Enforcement is No Longer Equitable.*

In its decision, the Courts of Appeals concluded that the provision of Rule 60(b)(5) relied on by petitioner, that "it is no longer equitable that the judgment should have prospective application," required a showing of a change in circumstances which makes continued enforcement of the injunction inequitable. It therefore reversed the decision below because the district court had not found there to be a change in circumstances justifying relief but had rather granted petitioner's motion because he found the relief obtained by respondents in the consent judgment entered in 1973 was broader than that "necessary to achieve the relief originally sought." [Ap. D-124][2]

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[2]Citations abbreviated as Ap. are to the Appendix attached to the Petition.

The Court of Appeals based its decision on its interpretation of an earlier case *De Fillipis v. United States*, 567 F.2d 341 (7th Cir. 1977) and also on *United States v. Swift*, 286 U.S. 106 (1932), which it had relied on in *De Fillipis*. *De Fillipis* concerned a motion brought under the same provision of Rule 60(b)(5) relied on by petitioner in this case. In interpreting that provision, the Court in *De Fillipis* cited and relied on the following language from *United States v. Swift:*

> " 'There is a need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, *whether right or wrong*, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting (emphasis added)...No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression...' "
>
> *De Fillipis*, 567 F.2d at 344.

In its decision in this case, the Court of Appeals affirmed and clarified its earlier interpretation of Rule 60(b)(5) as requiring a change in circumstances such that enforcement of the injunction has become inequitable. It concluded that the district court's decision was:

> "a major departure from the rule of decision established by *Swift* and consistently followed by this and other courts in interpreting the 'no longer equitable' phrase contained in Rule 60(b)(5) as requiring a change in conditions." [Ap. B-114]

Petitioner argues that the Court of Appeals erred in relying on the standard for modification of an injunction set forth in *United States v. Swift*. He characterizes that standard as "the more strict common law standard" in effect prior to the promulgation of Rule 60(b)(5). Petitioner's position is supported neither by the decisions of this Court, by the decisions of other circuits, nor by the history of and commentary on Rule 60(b)(5). In fact, petitioner relied on *Swift* in urging its interpretation of Rule 60(b)(5) before the district court.

It is true, as petitioner asserts, that 60(b)(5) was first added to Rule 60(b) by amendment in 1946[3] along with other provisions. Rule 60(b) as originally enacted in 1938 contained only one ground for relief from judgment by motion, that of "mistake, inadvertance, surprise, or excusable neglect" and did not make clear the status of pre-existing procedures or grounds for relief from final judgment, such as bills of review, coram nobis, or audita querela.[4] The 1946 amendments added the other grounds presently contained in the rule, including (b)(5). The Advisory Committee Report states in explanation:

> "It endeavored then to amend the rules to permit, either by motion or independent action, the granting of various kinds of relief from judgements which were permitted in the federal courts. 60(b) as initially enacted covered only

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[3]The 1946 amendments became effective March 19, 1948. 7 Moores Federal Practice §60.18(6) at 210 (1979).

[4]Report of Advisory Committee on Rules for Civil Procedure of June 14, 1946. 5 F.R.D. 433, 477, *et seq.*

> mistake, inadvertence, surprise, or excusable neglect, and did not make clear the status of the pre-existing procedures and grounds for obtaining relief from final judgment, such as bills of review, coram nobis or audita querela.[5]"

The provision contained in (b)(5), that prospective enforcement was no longer equitable, was based on a ground for relief which had been available under a bill of review, one of the procedures abolished by the 1946 amendments. Under a bill of review, a change in law or circumstance could render a decree no longer proper. 7 Moores Federal Practice §60.15(4) at 63 (1979). See also " Relief from Civil Judgments," 55 Yale Law J. 623, 627 *et seq.* (1946).

Thus, contrary to petitioner's assertion, Rule 60(b)(5) was intended to incorporate the pre-existing substantive standards for relief from judgment. The change it made was on the procedures, eliminating all the various procedures in favor of two: motion and independent action. Courts have therefore drawn on prior case law in interpreting the provisions of Rule 60(b). In *System Federation v. Wright*, 364 U.S. 642 (1960) this Court, in considering a motion to modify an injunction under Rule 60(b)(5), quotes extensively from *Swift* concerning a court's power to modify an injunction in light of changed circumstances. Courts in other circuits have likewise relied on the standard articulated in *Swift* to interpret Rule 60(b)(5). *Theriault v. Smith*, 519 F.2d 809 (1st Cir. 1975); *Lubben v. Selective Service System*

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[5] *Ibid*, p. 478

Local Bd. No. 27, 453 F.2d 645 (1st Cir. 1972); *Schildhaus v. Moe*, 335 F.2d 529 (2nd Cir. 1964); *Morse-Starrett Products Co. v. Steccone*, 205 F.2d 244 (9th Cir. 1953). The Courts in *Lubben* and *Morse-Starrett* specifically note that the 1946 amendments were intended to incorporate, not to change, the existing substantive standards for relief, and, in particular, that 60(b)(5) codifies the standard set forth in *Swift*.

Thus, the Court of Appeals' reliance on *Swift* as an aid in interpreting Rule 60(b)(5) is correct in light of the history of that rule and in light of decisions of this Court and other circuits. Petitioner has cited no authority for his assertion that the standard established in *Swift* became "obsolete" with the passage of Rule 60(b)(5)[8].

B. *Relief Under Rule 60(b)(5) on the Ground that a Judgment is No Longer Equitable Requires a Determination that Changed and Unforeseen Circumstances will Cause Grievous Hardship if Relief is not Granted.*

The cases discussed in the preceding section are in accord in setting forth the standard which a moving party must meet to obtain relief under Rule 60(b)(5) on the ground that "it is no longer equitable that the judgment should have prospective application." The standard has two components: (1) there must be changed and unforeseen circumstances aris-

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[8]Petitioner appears to suggest that *Klapprott v. United States*, 335 U.S. 601 (1949) supports his position on this point, but that case, which will be discussed in more detail in a subsequent section, concerned Rule 60(b)(6), not Rule 60(b)(5). The other citation by petitioner on this point is *Ackerman v. United States*, 340 U.S. 193 (1950). That case, which will also be discussed later, denied relief under Rule 60(b)(6) and did not discuss Rule 60(b)(5). Moreover, petitioner cites only to the dissent in that case.

ing since the entry of the judgment sought to be modified, and (2) the changed circumstances must be such that grievous wrong results if relief from judgment is not granted. See also *Coalition of Black Leadership v. Cianci*, 570 F.2d 12 (1st Cir. 1978); and 11 Wright and Miller, Federal Practice 2863 at 207 *et seq.* (1975). Petitioner has cited no case in which relief under this provision of Rule 60(b)(5) has been granted without a showing of circumstances arising since the injunction which justified relief because of their impact on the decree or on the moving party, and respondents are aware of none.

Petitioner did assert before the district court two circumstances arising since the entry of the judgment in June of 1973 which he felt entitled him to relief. The first was that since that date three of the four assistance programs mentioned in the first paragraph of the 1973 order (Blind Aid, Old Age Assistance, and Disabled Aid) had been transferred to the federal government and were no longer administered by petitioner. The district court in its decision agreed with respondents that this circumstance did not justify relief at this time because the change occurred on January 1, 1974, and, more importantly, because the AFDC program, the subject of petitioner's motion, is still administered by petitioner.

The second changed circumstance asserted by petitioner related to state budgetary problems which petitioner contended made the alteration in the effective date of AFDC eligibility necessary or desireable because money could be saved thereby. Respondents argued before the district court that this alleged changed circumstance did not justify relief because the budgetary problems were at least in part the result of decisions made by petitioner and other state officials, the same budgetary concerns could justify relief from any injunction involving

state-funded programs, and there was no showing of grievous hardships resulting to petitioner. The district court specifically stated that it was not basing its decision to grant relief on the budgetary concerns of petitioner. [Ap. D-125]

The district court rested its decision, then, not on any circumstances which occurred since the entry of the judgment on June 1, 1973, but rather on its analysis of the issues raised and the relief sought in the complaint. The district court concluded that the consent judgment provided respondents with broader relief than that "necessary to achieve the relief originally sought" [Ap. D-124]; and on this ground, and this ground alone, found it inequitable to continue to bind petitioner. Respondents understand the district court to mean that the consent judgment provided respondents broader relief than that which the district court now considers respondents could have achieved through litigation. In granting relief from judgment on this basis, the district court is clearly analyzing the conditions which existed at the time the consent judgment was entered into and is readjusting the judgment to produce what it now considers to be the order that should properly have been entered in 1973. This is precisely what the Supreme Court in *Swift* stated could not be done: "The injunction whether right or wrong is not subject to impeachment in its application to the conditions that existed at the time of its making..." *Swift*, 286 U.S. at 119.

Because the district court applied an incorrect legal standard in interpreting Rule 60(b)(5), the Court of Appeals properly reversed the decision. While it is true, as petitioner argues, that the district court is to exercise discretion in acting on a motion to modify a judgment under Rule 60(b), review is proper to determine whether the correct law is applied. The Court of Appeals' conclusion that the district court applied an

incorrect legal standard in interpreting Rule 60(b)(5) is consistent with decisions of this Court and those of other circuits, and petitioner has cited no case which articulates a different standard under Rule 60(b)(5) than that applied by the Court of Appeals.

II. THIS COURT SHOULD NOT REVIEW THE ISSUE OF RELIEF UNDER RULE 60(b)(6) BECAUSE PETITIONER DID NOT RAISE IT BEFORE EITHER COURT BELOW.

Petitioner's motion for relief from judgment was based on Rule 60(b)(5) on the ground that "it is no longer equitable that the judgment should have prospective application." It is that provision which the district court interpreted and applied in its decision. On appeal petitioner argued the correctness of the district court's interpretation of Rule 60(b)(5) and did not urge any alternative provision of Rule 60(b) as a ground for relief. The Court of Appeals' decision, then, considered only whether the district court's interpretation of Rule 60(b)(5) was correct.

For the first time, petitioner now characterizes the district court's decision as really based on Rule 60(b)(6), "any other reason justifying relief from the operation of the judgment," even though this provision was not even mentioned in the district court's decision. Petitioner then claims that the Court of Appeals erred in not considering whether he was entitled to relief under Rule 60(b)(6) even though he never asked the Court of Appeals to consider that provision.

Petitioner cites several cases in support of this argument, none of which hold that a Court of Appeals must consider grounds for relief under 60(b) which are raised neither in the district court nor on appeal. In *Klapprott v. United States*, 335 U.S. 601 (1949) the issue on this point was whether the amend-

ments to Rule 60(b) which became effective March 19, 1948, after the district court's ruling, should apply in this Court's review. This Court decided that under Fed.R.Civ.P. 86(b), the additional grounds contained in Rule 60(b) should apply to pending cases. *Block v. Thousandfriend*, 170 F.2d 428 (2nd Cir. 1948) follows *Klapprott* on this point. In *Gray v. Estelle*, 574 F.2d 209 (5th Cir. 1978) and *In Re Four Seasons Securities Laws Litigation*, 502 F.2d 834 (10th Cir. 1974), the moving party raised alternative grounds for relief under Rule 60(b), and the courts found it proper to consider them all. Finally the footnote in *Eric Rios Bridoux v. Eastern Airlines*, 214 F.2d, 207, 209 (n.3) (D.C. Cir. 1954) cited by petitioner does not make clear what grounds for relief under Rule 60(b) were urged by the moving party. Thus in none of these cases is the situation similar to the instant case, where there has been no intervening change in Rule 60(b) and it is clear that petitioner never raised the ground for relief which he now asserts.

By way of explanation for his failure to raise Rule 60(b)(6) in either court below, petitioner asserts that the Court of Appeals for the Seventh Circuit in *De Fillipis v. United States*, *supra*, stated clearly that relief cannot be sought under both Rule 60(b)(5) and Rule 60(b)(6). Since petitioner also argues that courts should or must consider all applicable grounds for relief under Rule 60(b), he apparently views the Court of Appeals' position in *De Fillipis*, or his construction of its position, as error. Nevertheless he did not present his view for consideration by the Court of Appeals, so it is impossible to say at this time what the ruling of that court would have been had he done so.

Because petitioner chose not to raise before either court below Rule 60(b)(6) as a ground for relief, apparently based on his interpretation of an earlier case by the Court of Appeals which he also never ad-

dressed in either court, respondents submit that this Court should not now review the question of whether petitioner is entitled to relief under Rule 60(b)(6). Under the circumstances of this case, the failure of the Court of Appeals to consider relief under Rule 60(b)(6) is not inconsistent with any decision of this Court or of other circuits.

III. PETITIONER IS NOT ENTITLED TO RELIEF UNDER RULE 60(b)(6) AS INTERPRETED BY THE DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS.

Assuming that this Court finds it appropriate to consider petitioner's entitlement to relief under Rule 60(b)(6) at this time, respondents' position is that he does not meet the standard for such relief.

This Court first discussed 60(b)(6) in *Klapprott, supra.* In that case a default judgment had been entered in a denaturalization proceeding and four years later the defaulting party moved to have the judgment set aside. This Court found that the reasons for failure to defend were not due to neglect[7], but constituted an extraordinary situation which justified relief under Rule 60(b)(6).

The parameters of Rule 60(b)(6) were clarified further in *Ackerman v. United States,* 340 U.S. 193 (1950) in which relief from a judgment which was not appealed was sought under Rule 60(b)(6) approximately four years after the judgment was entered. This Court found the denial of relief proper. It found that the moving party was represented by counsel,

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[7]This Court noted that were the failure to defend due to neglect, relief could only be considered under Rule 60(b)(1), in which case, because of the one-year time limitation, relief would be barred. *Klapprott,* 335 U.S. at 613.

had had the opportunity to appeal, and had made a conscious and voluntary decision not to appeal, which factors it concluded distinguished that case from *Klapprott*, where there were factors beyond the moving party's control. Again, this Court emphasized that the circumstances warranting relief under Rule 60(b)(6) must be "extraordinary." *Ackerman*, 340 U.S. at 202. Circuit courts have followed *Ackerman* in finding that Rule 60(b)(6) may not be relied upon to relieve a party from the consequences of voluntary decisions made with counsel in the course of litigation. *Lubben v. Selective Service System Local Bd. No. 27*, 453 F.2d 645 (1st Cir. 1972); *Whiteleather v. U.S.*, 264 F.2d 861 (6th Cir. 1959).

The standard set forth in *Klapprott* and *Ackerman* clearly does not justify relief in the instant case. The judgment of June 1973, was entered by consent, and petitioner was represented by counsel. Petitioner makes no argument that the action was not voluntary. Rather, he argues that the "parties did not intend" the judgment to preclude the alteration of the policy concerning the effective eligibility date for AFDC, that the concessions were "gratuitous and unappreciated." It should be clear that petitioner is in no position to speak to the intent of respondents. Moreover, the district court ruled that the first paragraph of the 1973 judgment did by its terms foreclose petitioner from altering the policy as he wished. (Petition pp. 5 and 6) That ruling was not appealed by petitioner. Therefore, it appears that petitioner is really arguing that he entered into the judgment by mistake or inadvertence. Relief on those grounds is covered by Rule 60(b)(1), which has a time limitation of one year. Rule 60(b)(6) cannot be used to circumvent the time limits of 60(b)(1). *Klapprott*, 335 U.S. at 613.

Petitioner has presented no factor to this Court or the courts below which shows that he was precluded from raising the objections he now has to the 1973 judgment prior to its entry. Essentially, he has now thought better of the agreement because of the expenditure of funds involved and wishes to be relieved from the consequences of the decision to consent to judgment in 1973. This is certainly not the type of extraordinary circumstances beyond the control of the moving party which this Court has required for relief under Rule 60(b)(6), and petitioner has cited no case in which relief was granted under even remotely similar circumstances.

CONCLUSION

Petitioner has not shown that the Court of Appeals' interpretation of Rule 60(b)(5) is inconsistent with any decision of this Court or any decisions of other circuits, nor has he shown that he is entitled to relief under Rule 60(b)(6) based on any decision of this Court or decisions of other circuits. This Court has considered the standards for relief under both provisions in previous decisions and the Court of Appeals' decision is consistent with those. No doubt the results of the Court of Appeals' decision are of importance to petitioner, because money was saved by petitioner due to the district court's ruling. However, petitioner has achieved the result he wishes in that the amendment to 49.19(4)(b), WIS. STATS. permits modification of the injunction effective April 1, 1981, as the Court of Appeals has ruled. Thus, petitioner's argument that he should not be bound "forever and a day" and is deprived of all options by the Court of Appeals' decision is misplaced. No more has happened than that he has been held to the terms of a consent judgment until the standards for modification of Rule 60(b) have been met. Moreover, it would appear that, given the particular circumstances of this case, the issue which petitioner wishes this court to review is not likely to arise again.

For these reasons, respondents respectifully submit that this Court should deny the petition for writ of certiorari.

Dated at Madison, Wisconsin this 30th day of November, 1981.

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